M/S EONG SENG CREDIT SDN BHD

v.

CHUAH CHEAN SOON

HIGH COURT MALAYA, ALOR SETAR
KN SEGARA J
[CIVIL APPEAL NO: 12-28-1995]
2 MARCH 1996

BILLS OF SALE: *Loan - Loan of money in exchange for post-dated cheque - Whether original payee can be a holder in due course - Who can be a holder in due course - Bills of Exchange Act 1949, s. 29(1)(b)*

CONTRACT: *Loan - Claim for money lent - Burden of proof - Who bears burden of proving that loan was taken - Absence of an agreement - Failure to call person receiving money and person who witnessed transaction - Whether alleged loan proved*

This was an appeal against the decision of the trial judge who allowed the respondent's claim against the appellant. In the lower court, the respondent claimed against the appellant for the sum of RM30,000, allegedly borrowed by the appellant. This was evidenced by a cheque ('exh. P1') drawn by the appellant and given to the respondent in exchange for the loan of RM30,000. Apparently, when exh. P1 was presented for payment, it was dishonoured with the remark "payment stopped". Alternatively, the respondent claimed as holder in due course of exh. P1.

The appellant denied all of the above and also of having known the respondent. The respondent alleged that the sum of RM30,000 was handed to one Yeoh Phaik Kee ('YPK') who was the managing director of the appellant.

The issues before the court were (i) whether the fact that YPK was the brother-in-law of the respondent's wife should be taken into consideration; (ii) whether the respondent was a credible witness and; (iii) whether the respondent was in fact a holder in due course of exh. P1.

Held:

[1] If the trial judge carefully examined the evidence of the plaintiff and took into consideration the close relationship of the respondent to YPK, that YPK was in personal financial difficulties at the material time and the place, time and manner in which the alleged sum of RM30,000 was handed to YPK, the trial judge would have concluded that the loan of RM30,000 was given to YPK in his personal capacity and not in his capacity as managing director of the appellant.

[2] The trial judge failed to consider and make a specific finding whether the sum of RM30,000 had in fact been handed over to YPK. The respondent's daughter who was alleged to have witnessed the transaction was not called to testify on the respondent's behalf. Neither was YPK called to testify that he in fact received the sum of RM30,000 in exchange for exh. P1. Instead, the trial judge took the view that the appellant ought to have called YPK and drew adverse inferences against the appellant for failing to do so. The burden was on the respondent to prove that the sum of RM30,000 was handed over to YPK.

[3] There was neither an oral nor a written agreement between the respondent and the appellant for the loan of RM30,000.

[4] The respondent was a witness whose credibility was very much in issue. He had contradicted his evidence by pleading earlier that exh. P1 was given to him in exchange for the sum of RM30,000 and subsequently, on recall, that an identified cheque was first given in exchange for the loan of RM30,000 and later replaced with exh. P1. By his own contradictory evidence, the respondent failed to establish that the loan of RM30,000 was given in exchange for exh. P1. Further, the respondent failed to call YPK to testify that he (YPK) in fact received the sum of RM30,000. The appellant's defence that it never borrowed the sum of RM30,000 from the respondent must inevitably succeed. The trial judge completely erred in his finding of facts in this regard.

[5] A holder in due course is a *bona fide* purchaser of the bill. Section 29(1)(b) of the Bills of Exchange Act 1949 provides that the original payee or bearer, though holder if in possession, cannot as payee or bearer, be a holder in due course. Only the second or subsequent possessor can be a holder in due course.

[5a] The pleadings clearly alleged that the appellant drew cheque exh. P1 to the respondent for the alleged loan of RM30,000. Therefore, the respondent was the original bearer of exh. P1 at all material times. It was never pleaded that exh. P1 was originally issued to YPK or to some other 3rd party by the appellant who then negotiated it with the respondent. The respondent must stand or fall on his pleadings and his alternative claim must therefore fail. The trial judge erred in law in holding that the respondent was a holder in due course of exh. P1.

[Appeal allowed with costs.]

Legislation referred to:
Bills of Exchange Act 1949, ss. 29(1)(a), (b), (2), 31(2), 38, 73

For the defendant - Yee Teck Fah (Ong Gek Lin with him); M/s Yee Teck Fah & Co
For the plaintiff - Ahmad Farid (Chuah Peng San with him); M/s Chuah Halim & Co

Reported by Usha Thiagarajah & S Dharmendran

JUDGMENT

KN Segara J:

The issue before the Sessions Court judge was relatively simple – did the defendant company borrow a sum of RM30,000 from the plaintiff, who at all material times was unknown to the defendant and had no business transactions with the defendant or alternatively, was the plaintiff "holder in due course" of cheque, exh. P1?

The plaintiffs claim against the defendant is for the sum of RM30,000 allegedly borrowed by the defendant from the plaintiff and evidenced by the defendant's cheque No. 742400 post-dated to 17 February 1986 (exh. P1) which, when presented for payment, was dishonoured with the remarks "Payment Stopped" (see paras. 1 and 2 of the statement of claim dated 5 June 1986). In the alternative, the plaintiff claims the said sum of RM30,000 as holder in due course of the said Public Bank Berhad cheque No. 742400 (see para. 5 of the statement of claim). The statement of claim was never amended at any time to aver positively that exh. P1 came into the possession of the plaintiff as a result of it having been negotiated to him by someone other than the original drawer of the said cheque. In other words, the plaintiffs position remained as pleaded in para. 2 of the statement of claim, that is, Public Bank Berhad cheque No. 742400 **drawn by the defendant** was **given by the defendant** as payment for the loan of RM30,000 to the defendant by the plaintiff. The plaintiff never **pleaded** any particulars regarding the date the sum of RM30,000 was loaned to the defendant or the date the cheque was actually issued by the defendant and post-dated to 17 February 1986, in payment of the RM30,000 loan. It is extremely important that pleadings should set out all the essential particulars so that the issues can be narrowed and identified in order that parties know in advance the case they have to meet. It is trite law that parties stand or fall on their pleadings and in a civil case, the burden is on the plaintiff to prove its case on the balance of probabilities, based entirely on its pleadings, amended if necessary.

The defendant's amended defence dated 7 September 1993 sets out its defence quite clearly in para. 1, 2, 3 and 6.

In para. 1 of the amended statement of defence, the defendant company denies that the company borrowed the sum of RM30,000 or any sum from the plaintiff as alleged in para. 1 of the statement of claim. The defendant avers that prior to the plaintiff's solicitors notice of action dated 20 April 1986 (exh. P2), the plaintiff was unknown to the defendant.

In para. 2 of the amended statement of defence the defendant company denies that the company gave the plaintiff a Public Bank Berhad cheque No.742400 post-dated to 17 February 1986. The defendant avers that the said cheque was reported lost and the loss was advertised in the local Chinese newspapers on 7 February 1986. The defendant further avers that the cheque was never given for the reason alleged or at all.

In para. 3 of the amended statement of defence the defendant contends that at all material times, the said cheque was incomplete and irregular and that the plaintiff had procured the said cheque through fraud and/or total failure of consideration.

In para. 6 of the amended statement of defence the defendant denies that the plaintiff is holder in due course of the said Public Bank Berhad cheque No.742400.

In the concluding paragraph of his judgment the learned Sessions Court Judge said,

> Oleh yang demikian saya berpuashati bahawa Plaintif di atas imbangan kebarangkalian telah berjaya membuktikan **setiap tuntutan** beliau terhadap Defendan, dan tuntutan Plaintif ini adalah dibenarkan dengan kos. (Emphasis added)

The learned Sessions Court judge seems to have concluded that plaintiff has proved that the defendant company had not only borrowed a sum of RM30,000 from the plaintiff but also that the plaintiff was the holder in due course of Public Bank Berhad cheque No. 742400 for RM30,000.

The learned Sessions Court judge has given judgment for the plaintiff both on the principal claim as well as the alternative claim pleaded in the statement of claim.

On the evidence adduced, was the learned Sessions Court judge correct in holding that the defendant had borrowed the sum of RM30,000 from the plaintiff?

If the learned Sessions Court judge had carefully examined the evidence of the plaintiff (SP1) and particularly had he taken into consideration:

1) the close relationship of the plaintiff to Mr. Yeoh Phaik Kee;

2) that Mr. Yeoh Phaik Kee was in personal financial difficulties at the material time;

3) the place, time and manner in which the alleged sum of RM30,000 was handed over to Mr. Yeoh Phaik Kee;

and then had the learned Sessions Court judge asked himself the right questions, he would have concluded the loan, if any, which was given by the plaintiff on 17 September 1985 would have in fact been a loan given to Mr. Yeoh Phaik Kee in his personal capacity (as a close relative) and not to Mr. Yeoh Phaik Kee in his capacity as manager of the defendant company.

Mr. Yeoh Phaik Kee was the brother-in-law of the plaintiff's wife ("Mr. Yeoh adalah biras saya"). The transaction between the plaintiff and Mr. Yeoh Phaik Kee was done at the **house of the plaintiff** on the morning of 17 September 1985 in the presence of the plaintiff's daughter and wife. The transaction between the plaintiff and Mr. Yeoh Phaik Kee appears to be a family and personal transaction. When questioned by court the plaintiff (SP1) testified:

> ... Benar 2-3 hari sebelum 17/9/85. En. Yeoh ada menelefon saya. Dia kata ada masalah kewangan dan hendak menukar cek dengan saya, dia ada kata jumlah RM30,000. Saya setuju, walaupun saya tiada cukup wang, saya pinjam daripada anak saya. Pada tahun 1985 saya berniaga menjual daging babi.

This answer to court is quite consistent with his answer in cross-examination when he testified that **his account had no money** and therefore he used his wife's and daughter's money. When asked what was his profit from this loan, he said there was none because Mr. Yeoh was his relative and he was always in financial difficulty. His testimony in cross-examination, *inter alia* was as follows:

> S: Kenapa tidak berikan 30,000 dalam bentuk cek?
>
> J: Akaun saya tiada Wang, jadi gunakan wang anak perempuan dan isteri saya. Hanya serah wang tanpa apa-apa resit.
>
> S: Apakah keuntungan daripada pinjaman ini?
>
> J: Tiada sebab dia adalah saudara saya, dan dia selalu kata ada masalah kewangan.

The learned Sessions Court judge failed to consider and make a specific finding whether the sum of RM30,000 in cash had in fact been handed over to Mr. Yeoh Phaik Kee on 17 September 1985 at the time the cheque (exh. P1) was handed over to the plaintiff. The learned Sessions Court judge failed to consider that neither the plaintiffs wife nor the plaintiffs daughter was called

to testify that the sum of RM25,000 was withdrawn on 17 September 1985 from their joint savings account and given by them to the plaintiff in order to hand it over to Mr. Yeoh Phaik Kee. Bearing in mind that RM25,000 is a large sum of money which was already earning interest in the joint savings account at the Standard Chartered Bank, Kangar, it is hard to believe that the plaintiff's wife and/or daughter **would have agreed** to **give** the money to the plaintiff for the sole purpose of handing it over to the defendant without expecting any interest on it. In the light of the plaintiff's testimony under cross-examination that he had no money in his account, the learned Sessions Court judge ought to have posed to himself the question:

> Where did the plaintiff get the extra RM5,000 to make up the RM30,000 on 17/9/85 for the exchange of cheque with Mr. Yeoh Phaik Kee?

Although there was evidence from a bank officer (SP2) that RM25,000 had been withdrawn on 17 September 1985 from the joint-savings account of depositor Tay Geak Choo @ Tai Chai Kee and/or Chuah Hoon Li (exh. P3), there was nevertheless no evidence that this money which was withdrawn was in fact handed over, subsequently, either to the plaintiff or the defendant. Neither Tay Geak Choo @ Tai Chai Kee nor Chuah Hoon Li, the depositors named in P3, were called to testify. According to the plaintiff's evidence under cross-examination, his daughter witnessed the money being handed over to Mr. Yeoh Phaik Kee on 17 September 1985. He testified, *inter alia*:

> Wang itu diserahkan di rumah saya. Wang itu tidak diserahkan di bank kepada Mr. Yeoh sebab tidak sesuai, kerana ramai orang di Bank. Di rumah sebab anak perempuan saya ada saksikan penyerahan itu. Selain dia tiada lagi.
>
> Cek itu diserahkan di rumah saya, apabila wang diserahkan kepada defendan. Tarikh itu adalah betul.
>
> Cek itu telah bertarikh dan bertulis satu bertandatangan. Ya, seperti dalam P1. Kali pertama Mr. Yeoh jumpa saya untuk pinjaman itu ialah pada 17.9.1985. Sebelum itu saya tidak nyatakan apa-apa syarat.

If it is true that the daughter had witnessed the transaction, why was she not called to testify on behalf of the plaintiff? The learned Sessions Court judge does not seem to have asked himself this question, in evaluating the credibility and veracity of SP1. Neither has the learned Sessions Court judge asked himself why Mr. Yeoh Phaik Kee himself, who is a very close relative of the plaintiff, was not called to testify that he had in fact received the sum of RM30,000 from the plaintiff on 17 September 1985 in exchange for the cheque, P1. Instead, the learned Sessions Court judge has taken the view that it is the defendant who ought to have called Mr. Yeoh Phaik Kee and drew adverse inferences for having failed to do so. He even went so far as to say that the defendant ought to have made Yeoh Phaik Kee a 3rd party. The

learned Sessions Court judge has seriously erred in law in this respect. The burden is on the plaintiff to prove that the sum of RM30,000 has been in fact handed over to Mr. Yeoh Phaik Kee, even before the issue of whether it was given to him in his personal and private capacity as a close relative of the family or given to him in his capacity as managing director of the defendant company, for and on behalf of the defendant, is considered and determined by the court, on the evidence available. The plaintiff never even pleaded that the sum of RM430,000 was handed over to Mr. Yeoh Phaik Kee on 17 September 1985, for and on behalf of the defendant company. There is neither an oral nor a written agreement between the plaintiff and the defendant for the loan of RM30,000.

The plaintiff closed his case on 9 November 1993 after calling 2 bank officers (SP2 & SP3) to testify. However, counsel for plaintiff applied to recall plaintiff (SP1) to testify when the case was fixed for continued hearing on 10 April 1994. Although the counsel for the defendant objected to SP1 being recalled, nevertheless, the learned Sessions Court judge allowed the plaintiffs counsel to recall SP1 for further examination-in-chief. When recalled, the plaintiff testified that exh. P1 was not handed to him on 17 September 1985 upon payment of the RM30,000 but instead it was some other unidentified cheque that was given to him. He testified P1 was given to him sometime in December 1985 in replacement of the said unidentified cheque given for the loan of RM30,000 in September 1985. By giving this fresh evidence on recall, the plaintiff has completely contradicted himself and shown to be a witness whose credibility is very much in issue. Why the plaintiff chose to introduce this evidence when it was never pleaded that an unidentified cheque was first given in exchange for RM30,000 and was later replaced with cheque exh. P1, is not very clear. However, the only reasonable conclusion that the plaintiff took this stand would be that it had dawned on him, after he had closed his case, and probably from information received from reliable sources, that cheque exh. P1, was from a cheque book that had not been issued to the defendant by the Bank in September 1985, and therefore could not be in existence then.

The defendant is a credit and leasing company whose primary business is that of lending money to any member of the public who wishes to borrow money on credit and leasing terms. In early 1985, the shareholders of the company were:

1) Lim Seong Leong,

2) Ong Kim King,

3) Lim Sian Eu,

4) Yeoh Phaik Kee.

Yeoh Phaik Kee was the managing director before 1986 and was also authorised to sign cheques for the defendant drawn on its account with Public Bank Berhad. The authorised signatories for cheques issued by the defendant before 25 January 1986 were:

1) Yeoh Phaik Kee,

2) Lim Seong Leong (DW1),

3) Ong Kim King.

After 25 January 1986 the authorised signatories for the defendant's cheque were:

(1) Lim Seong Leong (DW1),

(2) Ong Kim King,

(3) Lim Sian Eu (DW2).

All cheques issued by the defendant had to be signed by any two of the authorised signatories.

Mr. Yeoh Phaik Kee left the defendant company on 25 May 1986. Mr. Yeoh Phaik Kee could enter the defendant's office after 25 January 1986, although his authority to sign cheques had been withdrawn. He had free access to enter the defendant's office and discuss matters pertaining to the defendant company.

DW1, Lim Seong Leong, was the manager of the defendant company when he testified in court on 10 April 1994. He was a shareholder of the defendant company since 1980 and a director of the defendant company. He testified that he did not know the plaintiff before March 1993 and that on 17 September 1985, the defendant company did not borrow RM30,000 from the plaintiff. He testified that, to his knowledge, the plaintiff had no dealings with the defendant company and that the defendant did not issue cheque P1 to the plaintiff on 17 September 1985 because the cheque book for that cheque had not been issued by the bank to the defendant, as yet. He had received a letter from a lawyer that the said cheque was with him. He lodged a police report on 5 February 1986 (exh. D11) of the loss of Public Bank Cheque No. 742400 upon discovering the said cheque missing from the cheque book.

Under cross-examination, exh. P1 was shown to him and when he was asked:

Adakah tandatangan dalam cek itu tandatangan awak dan pengurus awak?"

his reply was:

> Pada masa ini P1 ditandatangan oleh Pengurus dan saya, tapi pada masa sebelum ini cek ini ditandatangan oleh saya seorang sahaja. Salah satu tandatangan adalah tandatangan saya, yang satu lagi saya tak pasti tandatangan siapa, sebab ia nampak serupa, tetapi boleh juga tidak serupa.

He was also cross-examined about Yeoh Phaik Kee's authority to sign cheques being withdrawn by resolution passed on 25 January 1986, *inter alia*, as follows:

> 5: Saya cadangkan bahawa pada masa itu En. Yeoh dalam keadaan kesusahan kewangan dan perlu ditarik balik kuasanya?
>
> J: Ya.

The suggestion in the cross-examination that Mr. Yeoh was in financial difficulties at that time and it was (therefore) necessary to withdraw his power (to sign cheques) is an acknowledgement by the plaintiff that Mr. Yeoh is not worthy of trust and responsibility, and in fact warranted the removal of his authority to sign cheques on behalf of the defendant.

DW1 further testified under cross-examination that when he signed exh. P1, Mr. Yeoh had no authority to sign it, implying that he had signed the cheque after Yeoh Phaik Kee's authority to sign had been revoked on 25 January 1986 and the bank had been informed accordingly.

His testimony when cross-examined on how Yeoh Phaik Kee's signature appeared on exh. P1 is as follows:

> S: Bagaimana tandatangan En. Yeoh ada di sana?
>
> J: Masa saya tandatangan cuma saya sahaja, apa yang berlaku kemudian saya tak tahu.

Although in examination-in-chief DW1 said he had signed the cheque, exh. P1, on 27 or 28 February 1986, in cross-examination, however, he testified he signed it on 27 or 28 January 1986. In view of the fact DW1 had lodged the police report, exh. D11, on 5 February 1986, he clearly has made a genuine mistake in his testimony under examination-in-chief about the month he signed the cheque – he could not have signed the cheque on 27 or 28 **February** 1986, if he had lodged the report on 5th February 1986.

DW1 further testified under cross-examination as follows:

Cek itu ditulis pada hujung Januari – Februari selepas anak saya ada kuasa tandatangan cek. Ya, benar saya serah cek pada anak saya pada hujung Januari @ awal Februari. Kebiasaannya bila hendak keluar saya tandatangan dan serah cek pada anak saya. Saya tak boleh tetapkan tarikh itu, setelah tahu anak saya ada kuasa, baru saya buat cek itu. Boleh jadi pada 25 @ 26.1.1998, sebab catit dalam surat kepada bank.

DW2, Lim Sian Eu, testified, *inter alia*, that in 1985 he helped his father, DWl, in the defendant company. He testified he had access to the credit records of the defendant and according to the records the defendant had no dealings with the plaintiff. He also testified that the defendant did not borrow RM30,000 from the plaintiff and that on 17 September 1985 the defendant did not give exh. P1 to the plaintiff because the cheque book containing that cheque had still not been issued by the bank to the company. The cheques in use then were with the serial numbers 703501 - 703550 found in the cheque book received on 18 September 1985 and cheques with the serial numbers 716851 - 716900 found in the cheque book received on 26 October 1985.

By his own contradictory evidence that there was an exchange of an unidentified cheque with Yeoh Phaik Kee for exh. P1, in December 1985, the plaintiff has failed to establish that RM30,000 was given in exchange for exh. P1. By failing to call Mr. Yeoh Phaik Kee to testify that he (Mr. Yeoh) had in fact received the sum of RM30,000 on 17 September 1985 or at any other time thereafter, the plaintiff has also further failed to establish a loan was given to the defendant, and that he is entitled to a repayment of the said sum from the defendant. The defendant's defence that it never borrowed the sum of RM30,000 from the plaintiff must inevitably succeed, in all the circumstances of this case. The learned Sessions Court judge has completely erred in his finding of facts in this regard.

On the evidence adduced by the plaintiff, there cannot be a successful alternative claim in law for the sum of RM30,000, as the holder in due course of Public Bank Cheque No.742400 because the said cheque (exh. P1) is interlinked and directly related to the plaintiff's alleged loan of RM30,000 to the defendant, on which he has failed to prove his case. There is total failure of consideration for the said cheque. For all intents and purposes, exh. P1 was intended to be evidence of a loan of RM30,000. On the pleadings, RM30,000 was a loan to the defendant and not Yeoh Phaik Kee. It was not the case for the plaintiff, both on the pleadings and the evidence, that Yeoh Phaik Kee negotiated P1 with the plaintiff for a loan of RM30,000 for himself. The plaintiff must stand or fall on his pleadings.

By s. 73 of the Bills of Exchange Act 1949 (Act), a cheque is a bill of exchange drawn on a banker payable on demand. The provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque, unless provided otherwise under Part III of the Act.

A cheque payable to bearer (as is the case with P1) is **negotiated by delivery** (s. 31(2)). A holder in due course is a holder who has taken a bill (cheque) complete and regular on the face of it, provided that:

(a) he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

(b) that he took the bill in good faith and for **value**, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it (see s. 29(1)).

The circumstances which make the **title of the person** who **negotiates** a bill to be **defective within** the meaning of the Act is when he obtained the bill, or the acceptance thereof by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as to amount to a fraud (s. 29(2)). The rights and powers of a holder in due course are:

(a) he may sue on the bill in his own name;

(b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

(c) where his title is defective -

(i) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

(ii) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill. (see s. 38)

The holder in due course is in a powerful position. He can acquire a good title from or through a thief. He is not affected by the fact that any predecessor obtained the bill by fraud, or pursuant to a fraudulent or otherwise illegal purpose or the consideration given for the bill by a predecessor has wholly failed. To achieve the exalted status of a holder in due course, a person must fulfill the conditions set out in s. 29(1)(a) & (b) of the Act.

It is obvious that a person cannot be holder in due course unless he is a holder, but not every holder *per se* can qualify to be "a holder in due course." A holder in due course is in effect a *bona fide* purchaser of the bill. The **original** payee or bearer, **though holder** if in possession, **cannot** as payee or bearer, **be a holder in due course**. This point is obliquely made in s. 29(1)(b) of the Act in the phrase **"at the time the bill was negotiated to him"**. Therefore, only the second or subsequent possessor of a bearer bill or indorsee in possession of a order bill can be a holder in due course.

In the present case, the pleadings clearly allege that the defendant drew cheque, exh. P1, to plaintiff for the alleged loan of the RM30,000. Therefore, plaintiff is the **original bearer of P1 at all material times**. It was never pleaded that P1 was originally issued to Mr. Yeoh Phaik Kee or to some other 3rd party by the defendant, who then **negotiated** it with the plaintiff. The plaintiff is therefore **not a holder in due course** within the meaning of the Act and his alternative claim must therefore, also fail. The learned Sessions Court judge erred in law in holding that the plaintiff was a **holder in due course of exh. P1.**

Appeal allowed with costs.